NOV 28 1980

MICHAEL RODAK, JR., CLERK

No. 79-880

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF CONTENTS

	Page
Introduction	1
I. The President and his closest advisors are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority	4
A. Respondents' arguments have been rejected by this Court as insufficient to deny absolute immunity in other contexts and do not support the conclusion that the President, in contrast to the constitutional officers of the Legislative and Judicial Branches, should be denied absolute immunity	4
B. The doctrine of derivative immunity is applicable to petitioners Kissinger, Mitchell, and Haldeman, who, at the President's direction, undertook acts that would be subject to absolute immunity if performed by the President himself	11
II. The court below erred in rejecting petitioners' claim of qualified immunity as a matter of law and in imposing retroactive damages liability on petitioners	15
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165	17
American Export Lines, Inc. v. *Alvez*, No. 79-1 (May 12, 1980)	16
Barr v. *Matteo*, 360 U.S. 564	4
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388	7
Butz v. *Economou*, 438 U.S. 478	4, 5, 7, 11, 12, 14
Davis v. *Passman*, 442 U.S. 228	9
Dennis v. *Sparks*, No. 79-1186 (Nov. 17, 1980)	11
Doe v. *McMillan*, 412 U.S. 306	7, 14

Cases—Continued Page

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 14
Ferri v. *Ackerman*, 444 U.S. 193 10
Gravel v. *United States*, 408 U.S. 606 ..... 13, 15
Gregoire v. *Biddle*, 177 F.2d 579, cert. denied, 339 U.S. 949 ..... 4, 8, 10
Hutchinson v. *Proxmire*, 443 U.S. 111 13
Imbler v. *Pachtman*, 424 U.S. 409 ..... 6, 7, 8, 9, 10
Kilbourn v. *Thompson*, 103 U.S. 168 ..... 12, 13
Mitchell v. *Forsyth*, petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980) 12
Mitchell v. *Zweibon*, petition for cert. pending, No. 79-881 (filed Dec. 7, 1979) 12
Stump v. *Sparkman*, 435 U.S. 349 ..... 6, 7
United States v. *Nixon*, 418 U.S. 683 7
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 10
Zweibon v. *Mitchell*, petition for cert. pending, No. 79-883 (filed Feb. 5, 1980) 5

Constitution:

United States Constitution:

Art. I, Sec. 3 (Impeachment Clause) 7, 8
Fourth Amendment 9, 16, 17

Statute:

Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510 *et seq.* 5

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-880

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Respondents begin their brief (Halperin Br. 1-13) with a lengthy statement of their factual contentions in this case. Although we believe that recitation to be largely irrelevant to the proper disposition of the legal issues presented here, we feel obliged to respond briefly at the outset to their discussion.

Respondents err in repeatedly asserting (Halperin Br. 1-2, 6, 24-25, 54, 57, 60, 62-65) that the wiretap program was not initiated for legitimate reasons of national security and foreign policy. As discussed in our opening brief, the district court found (see Pet. Br. 8), as fully supported by the record (see Pet. Br. 1-4), that the surveillance was instituted to investigate leaks that jeopardized the national security and foreign policy of the

United States. Moreover, respondents incorrectly suggest (Halperin Br. 4-6, 56, 60) that the surveillance sought only to uncover the source of the leaks concerning bombing missions in Cambodia. However, that was merely the latest in a long series of leaks, and the wiretap program was directed to these recurring breaches of government secrecy (see Pet. Br. 2-4). Morton Halperin, as Chief of the National Security Council Planning Group, had access to such leaked information (I J.A. 223; II J.A. 222-223).

Respondents also err in their failure to address separately the specific and distinct responsibilities performed by each petitioner with respect to the Halperin wiretap. For example, respondents assert (Halperin Br. 8) that "petitioners rejected suggestions from experienced officials of the FBI that the tap be terminated." See also Halperin Br. 57. But the record evidence cited by respondents shows that these matters were primarily the subject of internal discussions within the FBI, and nothing indicates that any of the petitioners were personally aware of or disapproved this advice.

Similarly, respondents state (Halperin Br. 8) that "petitioners never reconsidered the propriety of the Halperin wiretap, even though Department of Justice regulations required that an authorization for a national security wiretap be renewed every 90 days." See also Halperin Br. 39, 60. As explained in our opening brief (Pet. Br. 4), however, President Nixon directed that the wiretaps be terminated as soon as they were no longer necessary, and all of the petitioners relied on the FBI to conduct the wiretaps, including their actual operation and termination, in accordance with all applicable legal requirements.[1]

---

[1] Contrary to respondent's suggestion, the Department of Justice regulations did not put the burden on the Attorney General to monitor all outstanding national security wiretaps to ensure that none extended beyond 90 days. Rather, such wiretaps were to cease at the end of 90 days unless a renewal was requested from and authorized by the Attorney General. See Pet. Br. 4-5 n.7; II

In the same way, respondents contend (Halperin Br. 61) that "there were no efforts to minimize the interception of conversations unrelated to leaking" and that "petitioners made no effort whatsoever to minimize the scope or the duration of the surveillance." See also Halperin Br. 9-10. But as discussed above, such matters of implementation were left to the FBI as the expert in the surveillance area and were not overseen by petitioners personally. Indeed, petitioners were sent summaries of only a few of the calls that were intercepted or logged (I J.A. 248-249, 251, 264, 343, 345-346; II J.A. 50-53, 162, 163, 166-167, 170-171, 213-214, 238, 246-249, 312-314).[2]

Viewed in the light of their individual roles, petitioners cannot be held personally accountable for every aspect of executing the Halperin wiretap. Any suggestion of group culpability or vicarious liability in this case is entirely inappropriate and unwarranted.

J.A. 134-135, 138. Since Attorney General Mitchell did not regularly receive the surveillance reports on the Halperin wiretap and apparently did not personally see those few reports that were sent to his office after the expiration of the 90-day period (II J.A. 162, 163, 166-167, 170-171), the FBI's continued surveillance in violation of Department of Justice regulations did not come to his attention. The FBI's failure to comply with the 90-day requirement here may have resulted from Director Hoover's perception that this was "a White House project, not an F.B.I. project. And the specific rules that must be applied to F.B.I. projects would not necessarily be applied to a White House project" (Sullivan Dep. 191-192; see also *id.* at 89).

[2] Notwithstanding respondents' characterization that these wiretaps produced no useful information concerning the leaks (Halperin Br. 10, 56 n.24, 57, 60-61), we note that "[i]n one instance one of those people [with whom Mr. Halperin was in close contact] was a very, very prime suspect for espionage activity" and was "alleged * * * informally to have been an agent of a foreign government" (Haig Dep. 96, 101), and that other wiretaps led to the identification of one person who had been responsible for certain leaks and were significant in the investigation of other leaks (Haig Dep. 58-59). See also II J.A. 332-333 (Haldeman explanation of Clifford article).

I. THE PRESIDENT AND HIS CLOSEST ADVISORS ARE ABSOLUTELY IMMUNE FROM PERSONAL DAMAGES LIABILITY FOR DECISIONS MADE IN THE EXERCISE OF THE PRESIDENT'S OFFICIAL AUTHORITY

A. Respondents' Arguments Have Been Rejected By This Court As Insufficient To Deny Absolute Immunity In Other Contexts And Do Not Support The Conclusion That The President, In Contrast To The Constitutional Officers Of The Legislative And Judicial Branches, Should Be Denied Absolute Immunity

In our opening brief (Pet. Br. 18-44), we demonstrated that the principle of separation of powers and the "special functions" of the presidency (*Butz* v. *Economou*, 438 U.S. 478, 508 (1978)) require that the President of the United States be accorded an absolute immunity from personal damages liability arising out of the exercise of his official duties. This immunity is necessary "to protect the decisionmaking processes of" the President (438 U.S. at 503) and "is essential for the conduct of the public business" (*id.* at 507).[3]

Respondents' answer consists almost entirely of a number of policy reasons why the President should be subject to personal damages liability. However, many of these reasons are equally applicable to suits against legislators and judges, yet the Court has found them insufficient to deny an absolute immunity to those officials.

---

[3] Respondent's argument (Halperin Br. 28) that a deliberate constitutional violation is "not within any official's line of duty because the [Constitution] is a restraint and a limitation on governmental action" misconceives the nature of absolute immunity for official acts. See *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion); *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). It is clearly within the President's "official" duties to authorize investigations to discover the source of damaging leaks of military and foreign policy information, even if in a particular instance the investigation is carried out in an improper manner.

Respondents have offered little to justify the conclusion that the head of the Executive Branch, in contrast to the constitutional officers of the Legislative and Judicial Branches, should be denied absolute immunity for his official actions.[4]

1. Respondents' principal contention (Halperin Br. 39, 43-44, 45) is that this Court's decision in *Butz* v. *Economou*, *supra*, rejects the arguments raised by petitioners and forecloses the issue of absolute presidential immunity. This is an incorrect reading of *Butz*. To the contrary, the Court expressly recognized that "there are some officials whose special functions require a full exemption from liability" (438 U.S. at 508) and that absolute immunity is appropriate where "need[ed] to protect the decisionmaking processes of an executive department" (*id.* at 503) and "essential for the conduct of the public business" (*id.* at 507). For the reasons fully set out in our opening brief (Pet. Br. 18-44), the "special functions" of the presidency, reinforced by principles of separation of powers, justify an absolute presidential immunity.[5]

---

[4] Contrary to respondents' suggestion (Halperin Br. 19 n.12, 26-27 n.13), we have not conceded that absolute presidential immunity is inapplicable to respondents' claims under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Rather, as we pointed out in the petition (page 11 n.8) and in the reply memorandum at the petition stage (page 1), we have not sought review of the court of appeals' statutory ruling only because "even under the analysis of the court of appeals, no liability can be established under Title III." In addition, as we also noted in the reply memorandum (pages 1-2), if petitioners "are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action." See also Memorandum for the Respondent at 4-6, *Zweibon* v. *Mitchell*, petition for cert. pending, No. 79-883 (filed Feb. 5, 1980).

[5] Indeed, respondents' discussion in this regard is most notable for the complete absence of any mention of the unique characteristics and responsibilities of the Office of the President.

In much the same vein, respondents argue (Halperin Br. 27, 30-31, 45), in line with the opinion of the court of appeals in this case (Pet. App. 36a), that absolute immunity is available only for officials making adjudicative and prosecutorial decisions "hemmed in by the public adversary system and the availability of appeal" (Halperin Br. 31). Once again, respondents' "overly simplistic approach" (*Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976)), reflects too narrow a reading of the applicable precedents. The Court has never held that absolute immunity is confined to participants in the adjudicatory process and, as noted above, the decision in *Butz* v. *Economou* recognized that Executive Branch officials in other contexts could be entitled to absolute immunity.[6] Moreover, as previously discussed (see Pet. Br. 21-24, 29-32), there exist adequate safeguards in the case of the President, wholly apart from personal damages actions, to channel the exercise of presidential authority.

Respondents object that these safeguards are inadequate because they failed to prevent the wiretap in this case (Halperin Br. 22, 45) and because they provide no compensation to persons aggrieved by the official misconduct (Halperin Br. 22, 28-29, 39-40). But the identical objections could be made to this Court's decisions recognizing absolute immunity for legislators, judges, and prosecutors. Likewise, respondents' observation that

---

[6] We also note that judges are entitled to absolute immunity even where they act in a closed or ex parte proceeding or where appellate review is unavailable. See *Stump* v. *Sparkman*, 435 U.S. 349, 363 n.12 (1978). For example, if a federal magistrate had maliciously issued a warrant authorizing the Halperin wiretap and had ordered that respondents not be notified at the conclusion of the surveillance, there can be no doubt that absolute judicial immunity would be applicable. By the same token, a prosecutor is absolutely immune from damages liability for his decision to institute criminal charges (see *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 422), even though the harm suffered by an improperly indicted defendant cannot be remedied completely by a subsequent dismissal or acquittal.

"[f]or people in [their] shoes, it is damages or nothing" (Halperin Br. 40, quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)) only states the consequence of upholding an absolute-immunity defense; it does not help to answer the relevant question of "how best to reconcile the [respondents'] right to compensation with the need to protect the decisionmaking processes of [the presidency]" (*Butz* v. *Economou*, *supra*, 438 U.S. at 503). Surely respondents are in no different position in this respect from the unsuccessful plaintiffs in, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349 (1978), *Imbler* v. *Pachtman*, *supra*, and *Doe* v. *McMillan*, 412 U.S. 306 (1973).

Moreover, an absolute presidential immunity from personal damages liability does not elevate the President "above the law" (see, *e.g.*, Halperin Br. 21, 35-36, 50-51) but instead recognizes his accountability to the law—through impeachment, removal from office, congressional oversight, and criminal prosecution—in a way that also allows the uninhibited discharge of his constitutional responsibilities. Cf. *United States* v. *Nixon*, 418 U.S. 683, 715 (1974) (special rule for President does not "mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities * * * [and] to the performance of duties under that Article"). Indeed, it has never been thought that judicial officers, prosecuting attorneys, and legislators were placed "above the law" because of their absolute immunity.

Respondents also urge (Halperin Br. 21, 36) that an absolute presidential immunity is inconsistent with the Impeachment Clause of the Constitution, which provides (Art. I, Sec. 3):

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor,

> Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

However, as discussed in our opening brief (Pet. Br. 30) and as is evident from the authorities quoted by respondents (Halperin Br. 36), the concluding provision of the Clause is inapplicable to civil damages actions and establishes only that a criminal prosecution may follow a President's impeachment and conviction. Furthermore, the applicability of the Impeachment Clause to federal judges has not militated against recognition of an absolute judicial immunity, and no different conclusion should be drawn with regard to the President.

2. In an effort to show that the societal interests at stake here should be resolved in their favor, respondents argue that a qualified rather than an absolute immunity is sufficient to protect the legitimate operations of the presidency. In our opening brief (Pet. Br. 26-28, 32-37), we demonstrated at length that a qualified immunity would be seriously inadequate and would thereby "disserve the broader public interest * * * [in the] vigorous and fearless performance of the * * * [President's] duty * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427.

These concerns are not answered by respondents' assurance that "a President will become personally involved in litigation only when it is clearly shown that he directly participated in violations of constitutional rights" (Halperin Br. 23; see also *id.* at 47-48). As Judge Learned Hand correctly recognized in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), "if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried * * *." For much the same reason, respondents provide little security

by their assertion (Halperin Br. 65) that "the President's burden of establishing good faith usually will be minimal and can be overcome only by the strongest showing of impermissible motivation, intent to cause harm, or reckless disregard for the consequences of his action." As Judge Gesell observed (Pet. App. 52a), "[i]t is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved * * * [and] trial judges will almost automatically have to send such cases to full trials on the merits."

A President "inevitably makes many decisions that could engender colorable claims of constitutional deprivation" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 425), and rejection of absolute presidential immunity carries the likely danger of allowing numerous lawsuits by aggrieved citizens. Although respondents repeatedly proclaim (Halperin Br. 22, 26, 39, 41-42, 44-45) that this case may be confined to alleged violations of the Fourth Amendment, they have neither suggested any principled standard to justify such a limitation nor shown that this conditional protection, under which the President's immunity could be determined only after the fact in a judicial proceeding on the basis of the constitutional violation alleged, would adequately serve the compelling public policies that support the immunity.[7]

In the end, respondents' position fails because it does not preserve the presidency from the inhibiting effects

---

[7] Respondents appear to confuse the doctrine of absolute immunity with other concepts such as justiciability and cause of action. The question of absolute immunity need not be considered if the case is non-justiciable or the complaint fails to state a cause of action. Thus, unless the issues raised "are appropriate for judicial consideration and do[] not enmesh the courts in reviewing presidential functions which may be outside the scope of judicial review" (Halperin Br. 39), the suit will be dismissed without reaching the absolute-immunity defense. See *Davis* v. *Passman,* 442 U.S. 228 (1979).

of potential damages liability for the President. Such a risk of personal liability would impair the fearless and decisive exercise of presidential authority, and "[t]he public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages" (*Imbler* v. *Pachtman, supra*, 424 U.S. at 424-425). "[T]o submit * * * [the President] to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*Gregoire* v. *Biddle, supra*, 177 F.2d at 581). And, notwithstanding respondents' assertion to the contrary (Halperin Br. 46), it is simply not the case "that the only actions which will be inhibited are those which violate clearly established individual constitutional rights." Rather, as respondents recognize (Halperin Br. 40), future Presidents will have to "think[] twice about this lawsuit" before carrying out their official functions. In light of the "grave, complex and unique responsibilities" of the presidency (Pet. App. 53a (Gesell, J., concurring)), "[t]he societal interest in providing * * * [the President] with the maximum ability to deal fearlessly and impartially with * * * [the duties of his Office]" (*Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)) warrants an absolute presidential immunity.[8]

---

[8] Respondents argue (Halperin Br. 22, 42 n.18) that a President may be personally subject to injunctive relief and that "it is difficult to understand why [petitioners] resist judicial review of his conduct in the context of damage actions" (Halperin Br. 22). Whatever the availability of equitable relief directly against the President (compare, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 582-584 (1952)), there is a substantial difference between such a remedy and personal damages liability. As the Court has recently explained (citations omitted):

> [Absolute] immunity arose because it was in the public interest to have * * * [government officials] who were at liberty to exercise their independent judgment * * * without fear of be-

B. The Doctrine Of Derivative Immunity Is Applicable To Petitioners Kissinger, Mitchell, and Haldeman, Who, At The President's Direction, Undertook Acts That Would Be Subject To Absolute Immunity If Performed By The President Himself

In our opening brief (Pet. Br. 44-47), we showed that absolute presidential immunity should extend to those who act at the President's direction insofar as those acts, if performed by the President himself, would be protected by the immunity. See also *Dennis* v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 5. Respondents do not dispute that President Nixon "authorized this entire program" (I J.A. 212) and that petitioners Kissinger, Mitchell, and Haldeman "were operating under [his] specific authority and were carrying out [his] express orders" (I J.A. 48-49). Compare Pet. Br. 44-45 with Halperin Br. 3, 13, 52. Instead, relying on decisions under the Speech or Debate Clause, they contend that "there is no legal basis for petitioners' derivative immunity argument" (Halperin Br. 24; see also *id.* at 53-54). Contrary to respondents' contention, the concept of derivative immunity applicable here is well established in the decisions of this Court and of the courts of appeals (see Pet. Br. 45-46).[9]

> ing mulcted for damages should an unsatisfied * * * [party] be able to convince another tribunal that the * * * [official] acted not only mistakenly but with malice and corruption. In terms of undermining * * * [an official's] independence and his * * * [governmental] performance, the concern that his conduct will be examined in * * * [an injunctive proceeding], a proceeding in which he cannot be held liable for damages * * *, is not of the same order of magnitude as the prospects of being a defendant in a damage action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt * * * [violation of law].

Dennis v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 7.

[9] Respondents also assert in passing (Halperin Br. 23) that we have conceded, under *Butz* v. *Economou*, that petitioners Kissinger,

The principal authority cited by respondents in support of their position is *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). In that case, the sergeant-at-arms of the House of Representatives executed an order of the House to arrest and imprison Kilbourn for contempt of Congress. Thereafter, Kilbourn commenced an action for false imprisonment against the sergeant-at-arms and several members of the House who had caused the order of arrest to be issued. Finding that the contempt proceedings exceeded the authority of the House and that Kilbourn's arrest and imprisonment were therefore unlawful, this Court held that the sergeant-at-arms was subject to liability but that the members of Congress were absolutely immune under the Speech or Debate Clause.

Kilbourn is fully consistent with petitioners' analysis of derivative immunity. In *Kilbourn*, the congressional de-

---

Mitchell, and Haldeman are entitled to only a qualified independent immunity. This is incorrect. We expressly noted in our opening brief (Pet. Br. 50 n.44) that, "[a]part from the immunities derived from relations with the President, high-ranking government officials in certain circumstances may also be entitled to an independent absolute immunity based on the 'special functions' of their positions (*Butz* v. *Economou, supra*, 438 U.S. at 508)." However, we advised the Court (*ibid.*) that, "in light of the close nexus between presidential directives and the particular conduct at issue here, the Court need not reach any question of independent immunity in this case." We also observed (*ibid.*) that "the Court's resolution of the presidential immunity issue will serve to clarify the application of *Butz*" and thereby elucidate the proper analysis of petitioners' independent immunity under the *Butz* standard.

In view of these considerations, we have not further pressed the issue of petitioners' independent immunity in this case. Likewise, amicus Zweibon's arguments concerning the independent immunity of the Attorney General (Zweibon Am. Br. 10-20) are irrelevant here, because the Attorney General acted both at the direction of and in concert with the President in connection with the Halperin wiretap, and therefore they will not be addressed. The independent immunity of the Attorney General is presented in other pending cases (see *Mitchell* v. *Zweibon*, No. 79-881 (filed Dec. 7, 1979), and *Mitchell* v. *Forsyth*, No. 79-1120 (filed Jan. 18, 1980)), and should be briefed and decided in those cases.

fendants were found to be absolutely immune for official legislative actions taken in the House of Representatives. Unlike the sergeant-at-arms, "they did not in any manner assist in the arrest of Kilbourn or his imprisonment * * *" (103 U.S. at 200); since "these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him" (*ibid.*), the only basis for recovery against them was their legislative activity that the Court held was protected by the Speech or Debate Clause. The Court did not suggest that the members of Congress would have been immune if they had personally effected Kilbourn's arrest; rather, it held merely that the sergeant-at-arms had no immunity for conduct that would have been outside the scope of the Speech or Debate Clause if engaged in by a congressman. Cf. *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979).

This reading of *Kilbourn* is confirmed by subsequent decisions of this Court. In *Gravel* v. *United States*, 408 U.S. 606, 618, 620, 621, 622 (1972), the Court explained *Kilbourn* and the other decisions relied on by respondents in the following terms (emphasis added):

> *We * * * hold*[] *that the Speech or Debate Clause applies not only to a Member* [*of Congress*] *but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.*
>
> Nor can we agree * * * that our conclusion is foreclosed by *Kilbourn* v. *Thompson, supra, Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), and *Powell* v. *McCormack*, 395 U.S. 486 (1969), where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the Clause when they perform or aid in the performance of legislative acts.
>
> * * * * *
>
> None of these three cases adopted the simple proposition that immunity was unavailable to con-

gressional or committee employees because they were not Representatives or Senators; rather, *immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection.*

* * * * *

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution.* So, too, in *Eastland*, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, *no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest*, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no[t] * * * essential to legislating * * *.

* * * * *

[*T*]*he privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself.*

See also *Butz* v. *Economou, supra*, 438 U.S. at 496 n.23; *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507, 508 (1975); *Doe* v. *McMillan, supra*, 412 U.S. at 312, 315-316, 320, 323.

In the instant case, unlike in *Kilbourn*, it is clear that President Nixon would have been absolutely immune, pursuant to the doctrine of presidential immunity, if he had personally undertaken the actions performed at his direction by petitioners Kissinger, Mitchell, and Haldeman. In such circumstances, these presidential advisors are entitled to derivative absolute immunity.[10]

---

[10] That petitioners Kissinger, Mitchell, and Haldeman exercised discretion in implementing the President's directives, as respond-

II. THE COURT BELOW ERRED IN REJECTING PETITIONERS' CLAIM OF QUALIFIED IMMUNITY AS A MATTER OF LAW AND IN IMPOSING RETROACTIVE DAMAGES LIABILITY ON PETITIONERS

In our opening brief, we demonstrated (Pet. Br. 50-62) that, because the law concerning national-security surveillance was unsettled at the time of the Halperin wiretap, petitioners are entitled to qualified immunity as a matter of law. We also showed (Pet. Br. 62-69) that the judicial decisions establishing constitutional standards for national-security surveillance, which were rendered after the Halperin wiretap had been terminated, should not be applied retroactively to create personal damages liability for petitioners. While these are distinct issues, respondents have raised identical objections to both claims, and we accordingly reply to their arguments in a consolidated fashion.

Respondents argue (Halperin Br. 24, 25-26, 54-57, 62-64) that the questions of qualified immunity as a matter of law and non-retroactivity cannot properly be resolved here because there is a factual dispute whether the Halperin wiretap was undertaken in good faith for legitimate national-security reasons. Contrary to this contention, we believe that the district court has already found that the primary purpose of the surveillance was the

---

ents point out (Halperin Br. 23, 51-53), does not defeat their claim to derivative immunity. In the many cases in this Court and the courts of appeals that recognize derivative immunity (see Pet. Br. 45-46 & 47 n.40), it was invariably true that the subordinate official utilized discretion and independent judgment in carrying out his superior's orders; yet in no case did that lead to the denial of derivative immunity. Indeed, because "it is literally impossible, in view of the complexities of the modern * * * [presidency], for * * * [the President] to perform * * * [his duties] without the help of aides and assistants * * * [,] the central role of * * * [absolute presidential immunity would] inevitably be diminished and frustrated" if derivative immunity were confined to instances of virtually ministerial action by the subordinate (*Gravel* v. *United States, supra*, 408 U.S. at 616-617).

protection of national-security information and that any further proceedings on remand would support that ruling (see pages 1-2, *supra*; Pet. Br. 10 n.16). We also believe that the district court did not hold that petitioners acted with subjective bad faith (see Pet. Br. 60-61), concluding instead that their "conduct cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (Pet. App. 56a). In our view, therefore, the record adequately presents the issues of qualified immunity and non-retroactivity.

However, even if the factual record is regarded as inadequate, we suggest that it would be appropriate for the Court to set forth the governing legal standards before remanding to the district court for further proceedings. In opposing the petition for a writ of certiorari in this case, respondents raised the same contentions concerning the state of the record. Nevertheless, the Court granted certiorari on the qualified immunity and retroactivity issues, and those legal issues have now been fully briefed. Moreover, by clarifying the scope of the inquiry on remand and reducing the prospect of further protracted litigation, this course best serves the public policies supporting the immunity and non-retroactivity doctrines applicable to public officials (see Pet. Br. 37-38 n.34, 51, 65, 67-69). In these circumstances, the Court should address the legal issues presented even if a remand for additional proceedings is necessary. Cf. *American Export Lines, Inc.* v. *Alvez*, No. 79-1 (May 12, 1980), slip op. 5.

On the merits, respondents argue (Halperin Br. 25, 55, 58-62) that qualified immunity as a matter of law and non-retroactivity are inappropriate here because Fourth Amendment principles in the area of national-security surveillance were "settled" (Halperin Br. 25) and "clearly established" (Halperin Br. 55, 62) at the time the Halperin wiretap was initiated in 1969. While respondents agree that the applicability of the warrant requirement was unresolved (see Halperin Br. 59), they

contend that the reasonableness standard "had been clearly spelled out prior to 1969" and was "applica[ble] * * * to national security wiretaps" (*ibid.*). However, from the vantage of hindsight, respondents have all too easily transferred the standards for criminal law enforcement wiretaps to the area of national-security surveillance as it existed in 1969. Respondents' argument entirely ignores the separate status of national-security wiretaps and the distinctive content of the reasonableness standard applicable to them. As demonstrated in our opening brief (Pet. Br. 52-59, 63-65), the Fourth Amendment standard in national-security cases was neither clearly established nor clearly foreshadowed in 1969.[11]

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

---

[11] The uncertainty in the law is further illustrated by the discussion in amicus Zweibon's brief (pages 15-18) concerning internal Department of Justice consideration of national-security surveillance in light of this Court's decisions in *Alderman* v. *United States*, 394 U.S. 165 (1969), and related cases. Contrary to amicus Zweibon's contention, however, this discussion does not provide any evidence that petitioner Mitchell acted in bad faith. An Attorney General is neither bound by the advice rendered to him by Department officials nor required to adopt the most cautious interpretation of the law or the narrowest recommendation on departmental policy. Indeed, the very effort to probe into this decisionmaking process, and the corresponding need to examine high-ranking officials about their legal judgment reached a decade ago, persuasively demonstrate the importance of absolute immunity in this case (see Pet. Br. 32-37, 61).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333602 168